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14 Secretary of Labor, United States Department of Labor

15 UNITED STATES DISTRICT COURT
16 NORTHERN DISTRICT OF CALIFORNIA

17 ELAINE L. CHAO, Secretary of Labor,
18 United States Department of Labor,
19
20 Plaintiff,

21 v.

22 LAWRENCE J. MAZZOLA, et al.,
23 Defendants.

24) Civil Case No. C 04-4949 PJH (EMC)
25)
26) DECLARATION OF KARL
27) SPARGUR IN SUPPORT OF
28) SECRETARY'S MOTION FOR
PARTIAL SUMMARY JUDGMENT
Date: March 7, 2007
Time: 9:00 a.m.
Court: Courtroom 3, 17th Floor
Judge: Hon. Phyllis J. Hamilton

21 I, KARL SPARGUR, hereby declare and state as follows:

22 1. I am a senior investigator for the San Francisco Regional Office of the
23 Employee Benefits Security Administration ("EBSA") of the United States Department of
24 Labor. I have personal knowledge of the facts stated herein as facts that I discovered
25 during the course of my investigation and, if necessary, I could and would testify to them.
26 I also have reviewed the EBSA official file regarding this investigation and am familiar
27 with the documents contained therein, which were made or gathered in the ordinary course
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1 of official government business by me or other EBSA staff members. I was also the
2 Secretary's Federal Rule of Civil Procedure 30(b)(6) Designee for Defendants' Sixth
3 Amended Notice of 30(b)(6) Oral Deposition witness to testify regarding the following
4 areas: paragraphs 1 – 8 and 12 – 14 for EBSA investigations opened on or after 1987; and,
5 paragraphs 9 – 11, and can competently testify as to those matters. [A true and correct
6 copy of the Defendants' Sixth Amended Notice of 30(b)(6) Oral Deposition is attached
7 hereto as Exh. 2; and, a true and correct copy of the excerpt from the Deposition of
8 30(b)(6) Designee Karl Spargur taken on October 11, 2006 is attached hereto as Exh. 3,
9 pp. 9 – 10.]

10 2. Pursuant to section 504 of the Employee Retirement Income Security Act
11 of 1974 ("ERISA"), 29 U.S.C. § 1134(a), and at the direction of the Secretary of Labor,
12 EBSA has the authority to investigate whether any person has violated or is about to
13 violate any provision of Title I of ERISA or any regulation or order thereunder.

14 3. In the course of my employment with EBSA, I began an investigation of
15 the U.A. Local 38 Pension Trust Fund ("Pension Plan").

16 4. On February 23, 2000, based on a referral from the Internal Revenue
17 Service on November 4, 1999. I opened my investigation of the Pension Plan.

18 5. On July 22 and October 1 of 2003, EBSA expanded our investigation of the
19 Pension Plan to include the U.A. Local 38 401(a) Pension Trust, U.A. Local 38
20 Apprentice & Journeyman Training Trust ("Apprenticeship Fund"), U.A. Local 38 Health
21 & Welfare Fund ("Health & Welfare Plan"), U.A. Local 38 Vacation & Holiday Trust
22 ("Vacation & Holiday Fund"), U.A. Local 38 Scholarship Trust Fund ("Scholarship
23 Fund"), and U.A. Local 38 Group Supplemental Unemployment Benefit Trust
24 (collectively referred to as the "Local 38 ERISA Plans"), and Frank Sullivan, as the in-
25 house administrator of the Local 38 ERISA Plans and the non-ERISA U.A. Local 38
26 Convalescent Trust Fund ("Convalescent Fund"). In connection with those
27 investigations, I also reviewed numerous documents of the Convalescent Fund, which is
28 not covered by ERISA; and, Local Union 38 of the United Association of Journeyman and

1 Apprentices of the Plumbing and Pipefitting Industry ("Local 38"), also not an ERISA
2 plan. [A true and correct copy of the EMS Case Opening materials are attached hereto as
3 Exh. 4.]

4 6. My investigation involved obtaining documents from Local 38 and its
5 General Counsel, Albert Brundage ("Mr. Brundage"); the Joint Board of Trustees of the
6 Local 38 Funds ("Joint Board"); Frank Sullivan ("Mr. Sullivan"); M. Maroni Smith ("Mr.
7 Smith"), who was then the Convalescent Fund's Independent Trustee and is now deceased;
8 and various service providers, including Comyns, Smith, McCleary, auditor of the Local
9 38 ERISA Plans and the Convalescent Fund; Health Services Benefit Administrators, Inc.
10 ("HSBA"), third party administrator for the Local 38 ERISA Plans; and, McMorgan & Co.
11 and Loomis, Sayles & Company, L.P., investment managers employed by the Pension
12 Plan.
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14
15 7. EBSA entered into agreements with the Joint Board tolling the statute of
16 limitations as of September 18, 2001. [True and correct copies of the executed tolling
17 agreements effective September 18, 2001 are attached hereto as Exh. 5, MZLA 0031238-
18 243 and MZLA 0031445.] EBSA entered into an agreement with Mr. Sullivan tolling the
19 statute of limitations as of October 21, 2002. [A true and correct copy of the executed
20 tolling agreement with Mr. Sullivan is attached hereto as Exh. 6, X 000 575-578.] On
21 October 25, 2002, EBSA entered into an extension of the September 18, 2001 tolling
22 agreements with the Joint Board. [A true and correct copy of the October 2002 executed
23 tolling agreement with the Joint Board is attached hereto as Exh. 7, X 000 586-590.] On
24 November 26, 2003, EBSA consolidated the separate tolling agreements with the Joint
25 Board and Mr. Sullivan into a single extension agreement, which also included Mr. Smith.
26 Under the November 26, 2003 agreement, the parties agreed that the statute of limitations
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1 was tolled for all parties as of September 18, 2001, and would remain tolled until 60 days
2 after notice of termination. The November 26, 2003 tolling agreement also provided that
3 the Trustee Defendants would not make any further transfers of ERISA funds to the
4 Convalescent Trust. [A true and correct copy of the executed tolling agreement effective
5 September 18, 2001 is attached hereto as Exh. 8, MZLA 0028949-956.]
6

7 8. As of September 18, 2001, I had begun collecting and reviewing
8 documents and had served subpoenas for documents, dated August 29, 2001, to the
9 Administration Office ("Administration") and the Pension Plan's service providers. I had
10 not yet developed the facts sufficiently to establish whether any potential ERISA
11 violations had yet occurred.
12

13 **II. SUMMARY OF INVESTIGATIVE FINDINGS**

14 9. Through my review of documents, taking interviews, and attending or
15 reviewing the transcripts of the administrative depositions¹ of individuals with
16 responsibility over the Local 38 ERISA Plans, my investigation revealed that from
17 approximately the plan years ending June 30th 1993 to 2003, the Local 38 Pension Plan
18 was transferring large amounts of cash from its checking account. During those years, the
19 Pension Plan's financial statements reported a growing "Receivable Due from
20 Administration." As of June 30, 2003, with accrued interest, the Pension Plan's
21 "Receivable Due from Administration" totaled over \$54.5 million, or over 37% of the
22 Pension Plan's net assets. [A true and correct copy of the Pension Plan's Annual Report
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27 ¹ In September 2003 the Department deposed former Plan Administrator Frank Sullivan
28 and current and former Joint Board Trustees: Arthur Rud, Lawrence Mazzola, Sr., Larry
Mazzola, Jr., Ron Fahy, William B. Fazande, Vohon J. Kazarian, James R. Shugrue,
Robert Buckley, Sr., Robert Buckley, Jr. and Robert Nurisso.

1 Form 5500 and financial statement for the plan year ending June 30, 2003, is attached
2 hereto as Exh. 9, MZLA 0084487, MZLA 0084513 and MZLA 0084535.]

3 10. Specifically with respect to the Pension Plan's "Receivable Due from
4 Administration", through document reviews covering documents from July 1995 to June
5 2003, interviews and administrative depositions, my investigation revealed that, with the
6 exception of Lawrence "Larry" J. Mazzola, Sr., ("Mr. Mazzola") the Joint Board were
7 unaware of the cash transfers or the growing "Receivable Due from Administration."
8 Further, Mr. Mazzola was aware that Pension Plan money was being transferred to the
9 Convalescent Fund, but did not take steps to evaluate whether the cash transfers
10 represented a sound investment for the Pension Plan. For example, for the years in
11 question, I saw:
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- 14 a. No mention of the cash transfers in any of the trustees' meeting minutes;
- 15 b. No cost-benefit analyses;
- 16 c. No risk/return analyses;
- 17 d. No feasibility reports or studies;
- 18 e. To the extent I saw appraisals, they were few, out of date and did not
19 support the amount of the "Receivable Due from Administration" reported
20 on the Plan's Annual Reports Form 5500 and attached financial statements.
21 During my investigation, the highest appraisal I saw for the Konocti Harbor
22 Resort and Spa ("Konocti") was dated July 2003 for \$9.1 million. [A true
23 and correct copy of the Appraisal Of: Konocti Harbor Resort & Spa dated
24 July 2003 by Carneghi-Bautovich & Partners, Inc. is attached hereto as
25 Exh. 10 MZLA 0106491, MZLA 0106492.]
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1 11. In addition, through the interviews and administrative depositions that were
2 taken during my investigation, I learned that most of the trustees had never looked at any
3 of the Pension Plan's Annual Forms 5500 and attached financial statements. [A true and
4 correct copy of the excerpt from the Administrative Deposition of Arthur Rud, taken
5 September 4, 2003, is attached hereto as Exh. 11, MZLA 0001302 and MZLA 0001305 –
6 MZLA 0001307; a true and correct copy of the excerpt from the Administrative
7 Deposition of Larry Mazzola, Jr., taken September 5, 2003, is attached hereto as Exh. 12,
8 MZLA 0001006; a true and correct copy of the excerpt from the Administrative
9 Deposition of Ron Fahy, taken September 4, 2003, is attached hereto as Exh. 13, MZLA
10 0000818; a true and correct copy of the excerpt from the Administrative Deposition of
11 William Fazande taken September 5, 2003, is attached hereto as Exh. 14, MZLA 000862;
12 a true and correct copy of the excerpt from the Administrative Deposition of Vohon
13 Kazarian taken September 5, 2003, is attached hereto as Exh. 15, MZLA 0000921 –
14 MZLA 0000923, and MZLA 0000946 – MZLA 0000947; a true and correct copy of the
15 excerpt from the Administrative Deposition of James Shugrue, taken September 5, 2003,
16 is attached hereto as Exh. 16, MZLA 0001385 – MZLA 0001387; a true and correct copy
17 of the excerpt from the Administrative Deposition of Robert Buckley, Sr., taken
18 September 5, 2003, is attached hereto as Exh. 17, MZLA 0000743 – MZLA 0000747; a
19 true and correct copy of the excerpt from the Administrative Deposition of Robert
20 Buckley, Jr., taken September 4, 2003, is attached hereto as Exh. 18, MZLA 0000633; a
21 true and correct copy of the excerpt from the Administrative Deposition of Robert Thomas
22 Nurisso, taken September 3, 2003, is attached hereto as Exh. 19, MZLA 0001227 –
23 MZLA 0001228]

1 12. During an interview Mr. Sullivan informed me that the Convalescent Fund
2 does not make repayments to the Pension Plan. [A true and correct copy of the Report of
3 Interview of Frank Sullivan taken July 2, 2001 is attached hereto as Exh. 20 ¶ 11, MZLA
4 0031068.] My investigation uncovered the fact that the Pension Plan's "Receivable Due
5 from Administration" has increased substantially year by year.
6

7 13. The facts stated in this summary are fully explained below.

8 **III. BACKGROUND**

9 14. Local 38 is a labor union with members primarily in northern California
10 and is signatory to various collective bargaining agreements ("CBAs") with employers and
11 employer organizations, including the Northern California Mechanical Contractors
12 Association and the Master Plumbers Associations of San Francisco, Inc. Pursuant to
13 their collective bargaining agreements, trustors representing the union and employers
14 established the Local 38 ERISA Plans. The same trustors also established the
15 Convalescent Fund, which is not covered by ERISA. [A true and correct copy of the CBA
16 is attached hereto as Exh. 21, MZLA 0011301.]
17

18 15. The Local 38 ERISA Plans are trustee'd by the Joint Board. According to
19 section 47 of the CBA, the Joint Board must consist of six labor and six management
20 representatives appointed by the union and the employer associations. However, since at
21 least 1998 the Joint Board has had only five management trustees, and from June 2003
22 until December 2003, as few as four. [A true and correct copy of the CBA is attached
23 hereto as Exh. 21, MZLA 0011301, MZLA 0011328; a true and correct copy of the
24 Pension Plan's Annual Report Form 5500 for the plan year ending June 30, 1998 is
25 attached hereto as Exh. 22, MZLA 0009665, 0009675 – MZLA 0009676; a true and
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1 correct copy of the Joint Board's Pension Plan Minutes taken July 22, 2003 is attached
2 hereto as Exh. 23, MZLA 0002605; a true and correct copy of the Joint Board's Pension
3 Plan Minutes taken January 22, 2004 is attached here as Exh. 24, MZLA 0002617.] As of
4 July 22, 2003 the management trustees were Robert E. Buckley ("Mr. Buckley"), Robert
5 Buckley, Jr. ("Mr. Buckley, Jr."), Art Rud ("Mr. Rud"), and Ron Fahy; and, the union
6 trustees were Mr. Mazzola, Lawrence Mazzola, Jr., William B. Fazande, Larry Lee,
7 Vohon J. Kazarian ("Mr. Kazarian"), and James R. Shugrue (collectively referred to as
8 "Trustees"). [A true and correct copy of the Joint Board's Pension Plan Minutes dated
9 July 22, 2003 is attached hereto as Exh. 23, MZLA 0002605.]
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12 **Prior Investigations and Mazzola I Litigation**

13 16. Before my investigation in February 2000, EBSA (formerly the Pension
14 and Welfare Benefits Administration) had conducted several investigations of Pension
15 Plan, the Health & Welfare Plan and the Convalescent Fund.
16

17 17. Before my February 2000 investigation, the only EBSA investigation
18 concerning the Pension Plan's transfer of assets to the Convalescent Fund was the 1976
19 investigation of the imprudent loans that culminated in the Secretary suing the trustees for
20 making imprudent and prohibited loans. Subsequent investigations of the Pension Plan
21 and Convalescent Fund found that these loans were current and that the Pension Plan did
22 not extend any additional loans to the Convalescent Fund.
23

24 18. The Secretary's lawsuit stemming from the 1976 investigation charged the
25 Pension Plan trustees with imprudence in making a loan to the Convalescent Fund and
26 agreeing to an interest moratorium on two prior loans. [A true and correct copy of the
27 excerpted Civil Case No. 79-134 Joint Pretrial Statement is attached hereto as Exh. 25,
28

1 MZLA 0118784 – MZLA 0118785.] The loans were documented by promissory notes,
2 loan agreements and a deed of trust. The Convalescent Fund used the loan money to
3 operate Konocti. At the time of the 1976 investigation, Konocti had never been profitable.
4 [A true and correct copy of the excerpted Civil Case No. 79-134 Joint Pretrial Statement is
5 attached hereto as Exh. 25, MZLA 0118808.]
6

7 19. The issues in the lawsuit went to trial. The court's findings and judgment
8 are reported in Donovan v. Mazzola, 2 Empl. Ben. Cas. (BNA) 2115 (N.D.Cal. 1981),
9 judgment entered, 3 Empl. Ben. Cas. 1737 (N.D. Cal. 1982), aff'd, 716 F.2d 1226, 4 Empl.
10 Ben. Cas. (BNA) 1865 (9th Cir. 1983), cert. denied, 464 U.S. 1040, 4 Empl. Ben. Cas.
11 (BNA) 2544 (1984) ("Mazzola I").
12

13 20. The complaint in Mazzola I named several trustees who are also named in
14 the current complaint: Chairman and employer trustee Mr. Buckley; Co-Chairman and
15 union trustee Mr. Mazzola; and, union trustee Mr. Kazarian. [A true and correct copy of
16 the excerpted Civil Case No. 79-134 Joint Pretrial Statement is attached hereto as Exh. 25,
17 MZLA 0118782.] The court found, *inter alia*, that the trustees were imprudent for making
18 the loans, acted on both sides of these transactions, and consistently transacted business
19 with the Convalescent Fund for the purpose of aiding it at the expense of the Pension Plan.
20 The judgment ordered the trustees to make restitution of lost interest income and post a \$1
21 million bond, and provided for a court-appointed investment manager with exclusive
22 power to manage, acquire and dispose of the Pension Plan's assets for ten years.
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25 21. The court-appointed investment manager's 10-year tenure lasted from May
26 1983 until May 1993, after which the power to manage and administer the Pension Plan's
27 assets returned to the trustees.
28

1 22. EBSA's most recent investigation before my February 2000 investigation
2 was opened in August 1992 and involved a potential investment in a new San Francisco
3 baseball stadium. That investigation was closed in September 1993 and did not involve
4 reviews of the Pension Plan's Annual Report Form 5500 or other financial documents.
5

6 **Administration Office and Frank Sullivan**

7 23. The CBA is effective from July 1, 1997 to June 30, 2007. Section 49
8 provides for the establishment of the Administration Office to handle record-keeping and
9 the collection of deposits by employers for all the Local 38 Funds. These administrative
10 functions are authorized by a master trust agreement, the U.A. Local 38 Trust Agreement
11 Administrative Trust Provisions Section 4 ("master trust agreement"), which has been
12 incorporated into the separate trust agreements governing each plan. [A true and correct
13 copy of the CBA is attached hereto as Exh. 21, MZLA 0011301; a true and correct copy of
14 the master trust agreement is attached hereto as Exh. 26, MZLA 0011356.]
15

16 24. According to the master trust agreement, the Joint Board can engage the
17 services of an Administrator who has the authority to establish and maintain an office;
18 establish written procedures for collection of assets and income and payments of debts;
19 make changes to procedures to enforce the rules of the plan such as those relating to
20 eligibility to participate in the plan and the amounts and kinds of payments. In addition,
21 the Joint Board can delegate to the Administrator in writing the authority to hire and fire
22 employees and service providers. [A true and correct copy of the master trust agreement
23 is attached hereto as Exh. 26, Section 4.2.7 MZLA 0011356, MZLA 0011361- MZLA
24 0011362.] Although Section 49 of the CBA requires a written agreement between the
25 Local 38 Funds and Administration detailing the services to be provided and costs, I found
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1 no such agreement during my investigation. [A true and correct copy of the Report of
2 Interview of Frank Sullivan taken July 12, 2002 is attached hereto as Exh. 27, ¶ 3 MZLA
3 0031396, MZLA 0031397.]

4
5 25. In 1977, pursuant to section 4.2.7 of the master trust agreement, the Joint
6 Board of Trustees appointed Mr. Sullivan as the Administrator for all the Local 38 Funds.
7 [A true and correct copy of the excerpt from the Administrative Deposition of Frank
8 Sullivan, taken September 2, 2003, is attached hereto as Exh. 28, MZLA 0001561 –
9 MZLA 0001562.] Mr. Sullivan told me that he oversees the day to day operations of
10 Administration [A true and correct copy of the Report of Interview of Frank Sullivan
11 taken July 12, 2002, is attached hereto as Exh. 27 ¶ 10, MZLA 0031398.]

12
13 **Cash Flows among the Local 38 Trust Funds**

14 26. The Administration office maintains two accounts in its name at Comerica
15 Bank: (1) the clearing account is used as the lockbox to receive employer contributions;
16 and (2) the checking account is used to make transfers between the Local 38 Funds and to
17 pay administrative expenses, which are shared jointly among the Funds that Mr. Sullivan
18 administers. [A true and correct copy of the excerpt from the Administrative Deposition
19 of Frank Sullivan, taken September 2, 2003, is attached hereto as Exh. 28, MZLA
20 0001600.]

21
22
23 27. The Local 38 ERISA Plans are funded by contributions from participating
24 employers that are to be held in trust for plan beneficiaries. Employer contributions are
25 based on negotiated rate schedules. Each month, HSBA, the third party administrator,
26 sends each employer a pre-billing report detailing the names of employees covered and
27 their wage and fringe benefit rate codes. Each employer then calculates total fringe
28

1 benefits using the rate codes and forwards a single check covering all benefit plan
2 contributions to the lockbox account. [A true and correct copy of the excerpted
3 accounting workpapers for the plan year ending June 30, 2001 is attached hereto as Exh.
4 29, MZLA 0026469 – MZLA 0026470, & MZLA 0026475.]

5
6 28. Operation of the Administration Clearing, or Lockbox, Account: On a
7 daily basis, Comerica transfers employer contributions from the clearing account, also
8 referred to as the lockbox, to the individual accounts for the various Local 38 Funds in
9 accordance with "remittance banking instructions" from Mr. Sullivan. The remittance
10 banking instructions specify the percentage of total contributions that will be deposited in
11 each of the Local 38 Funds. According to Mr. Sullivan, the allocated amounts are based
12 on his estimate of the share each fund should receive based on his past experience and
13 given the work being done under current contracts at the bargained-for rates. [A true and
14 correct copy of the Report of Interview of Frank Sullivan taken July 12, 2002, is attached
15 hereto as Exh. 27 ¶ 22 MZLA 0031399; a true and correct copy of the excerpted
16 accounting workpapers for the plan year ending June 30, 2001, is attached hereto as Exh.
17 29, MZLA 0026475.] In addition, Mr. Sullivan transfers one-third of all employer
18 contributions intended for the Health & Welfare Plan to the Convalescent Fund directly
19 from the clearing account, before those funds are actually deposited into the Health &
20 Welfare Plan's account. [A true and correct copy of the excerpt from the Administrative
21 Deposition of Frank Sullivan, taken September 2, 2003, is attached hereto as Exh. 28,
22 MZLA 0001617.]

23
24 29. Operation of the Administration Checking Account: Through electronic
25 withdrawals, Mr. Sullivan transferred cash from the ERISA plans and made deposits into
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1 the Administration checking account. Mr. Sullivan and the Administration Office
2 employees used ERISA Plans' cash for various purposes, including to cover each Plan's
3 allocable share of common administrative expenses; to cover shortfalls in one Plan using
4 cash from other Plans; or to transfer cash into the Convalescent Fund to pay for Konocti-
5 related expenses. [A true and correct copy of the Report of Interview of Mark
6 Eitelgeorge, CPA, taken June 12, 2002, is attached hereto as Exh. 30 ¶ 16 MZLA
7 0031373, MZLA 0031375; a true and correct copy of the excerpt from the Administrative
8 Deposition of Frank Sullivan, taken September 2, 2003, is attached hereto as Exh. 28,
9 MZLA 0001575 – MZLA 0001576.]

12 30. Transfers from the Local 38 ERISA Plan Accounts: Mr. Sullivan has no
13 check-signing authority on any of Local 38 ERISA Plan bank accounts. Checks under
14 \$1000 are issued bearing facsimile signatures of Mr. Buckley, Chairman of the Joint
15 Board of Trustees, and Mr. Mazzola, Co-Chairman of the Joint Board. Larger checks
16 require handwritten signatures of both a labor and a management trustee. Disbursements
17 by check are reviewed at each meeting of the Joint Board. [A true and correct copy of the
18 excerpted accounting workpapers for the plan year ending June 30, 2001 is attached hereto
19 as Exh. 29, MZLA 0026491; a true and correct copy of the excerpt from the
20 Administrative Deposition of Frank Sullivan, taken September 2, 2003, is attached hereto
21 as Exh. 28, MZLA 0001577 – MZLA 0001578.] Despite the requirement for handwritten
22 signatures on large checks, Mr. Sullivan made electronic transfers of large sums money
23 out of one ERISA Plan account and into the Administration's Checking account without
24 review or approval of the Joint Board.

1 31. It was not until after I began my February 2000 investigation that I or
2 anyone at EBSA gained knowledge of Mr. Sullivan's practice of using these electronic
3 transfers to funnel monies from the Pension Plan to the Convalescent Trust.

4 32. Mr. Sullivan's practice of using ERISA plan monies to benefit the
5 Convalescent Fund appeared to be inconsistent with section 4.2.6 of the master trust
6 agreement, which requires that "[w]ithdrawals from the Fund may be made only upon the
7 signature of [one union and one employer trustee.]" [A true and correct copy of the
8 master trust agreement is attached hereto as Exh. 26, MZLA 0011357, MZLA 0011361.]

9 33. Messrs. Mazzola, Sullivan, and Brundage (Counsel for Local 38) stated
10 that the power to transfer money among the various Local 38 Funds is located in sections
11 37(d) and 48(a) of the CBA, which they believed grants trustees and the union the
12 authority to "reallocate" current assets and future contributions among the ERISA Plans
13 and the non-ERISA Trust. [A true and correct copy of the excerpt from the
14 Administrative Deposition of Larry Mazzola, Sr., taken September 3, 2003, is attached
15 hereto as Exh. 31, MZLA 0001189 – MZLA 0001193; a true and correct copy of the
16 excerpts from the Administrative Deposition of Frank Sullivan, taken September 2, 2003,
17 is attached hereto as Exh. 28, MZLA 0001711 – MZLA 0001719; and, a true and correct
18 copy of the Report of Interview of Lawrence Mazzola, Sr. taken June 19, 2002 is attached
19 hereto as Exh. 32 ¶ 30, MZLA 0031382.] Those provisions state, in relevant part:

20 **Section 37(d)** Upon 30 days notice from the Union to the Associations, the Union
21 shall have the right to reallocate any wages or fringes of any Trust Fund under this
22 Agreement, with the exclusion of the Contract Administration Fund, and said
23 allocations shall take effect at the end of the 30 day period.

24 **Section 48(a)** The Board of Trustees shall have the power and discretion to review
25 the financial needs of the Health and Welfare and Convalescent Trust and to effect
26 the allocations to each respective trust at any time and to amend the Wage and
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1 Fringe Benefit Addendum at any time to reallocate the contributions to each
2 respective trust.

3 [A true and correct copy of the CBA is attached hereto as Exh. 21, MZLA
4 0011301.]

5 34. With the exception of Mr. Mazzola, all the trustees stated during either my
6 interviews or at their administrative depositions that they were unaware of Mr. Sullivan's
7 electronic transfers among the various Local 38 Funds. These interviews and
8 administrative depositions took place after I began my investigation in February 2000;
9 before that date, neither I nor EBSA knew of Mr. Sullivan's electronic transfers or that the
10 trustees, excluding Mr. Mazzola, were ignorant of Mr. Sullivan's electronic transfers.

11 35. Many of the trustees stated during their administrative depositions that they
12 were unaware that Mr. Sullivan transferred one-third of the Health & Welfare Plan's
13 employer contributions to the Convalescent Fund. [A true and correct copy of the excerpt
14 from the Administrative Deposition of Arthur Rud, taken September 4, 2003, is attached
15 hereto as Exh. 11, MZLA 0001329 – MZLA 0001330; a true and correct copy of the
16 excerpt from the Administrative Deposition of Larry Mazzola, Jr., taken September 5,
17 2003, is attached hereto as Exh. 12, MZLA 0001034 – MZLA 0001035; true and correct
18 copy of the excerpt from the Administrative Deposition of Vohon Kazarian taken
19 September 5, 2003, is attached hereto as Exh. 15, MZLA 0000965; a true and correct copy
20 of the excerpt from the Administrative Deposition of James Shugrue, taken September 5,
21 2003, is attached hereto as Exh. 16, MZLA 0001401 – MZLA 0001404; a true and correct
22 copy of the excerpt from the Administrative Deposition of Robert Buckley, Jr., taken
23 September 4, 2003, is attached hereto as Exh. 18, MZLA 0000676 – MZLA 0000677; a
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1 true and correct copy of the excerpt from the Deposition of Robert Thomas Nurisso, taken
2 September 3, 2003, is attached hereto as Exh. 19, MZLA 0001236.]

3 36. Thus, what my investigation uncovered after it began in February 2000 was
4 that, without any oversight or authorization by the Board of Trustees, Mr. Sullivan freely
5 moved money from ERISA Plans to the Convalescent Fund, either directly or through the
6 Administration checking account.
7

8 **The Pension Plan**

9 37. The Pension Plan is Local 38's largest ERISA-covered plan. The Pension
10 Plan is a defined benefit plan which, with the appropriate amount of credited service,
11 generally provides full benefits upon Normal Retirement (age 65); early retirement
12 benefits upon attaining age 55; disability pension; and, death benefits to participants and
13 beneficiaries pursuant to the terms of the Plan and the CBA. [A true and correct copy of
14 the Plan Document is attached hereto as Exh. 33, MZLA 0011272.] As of June 30, 2002,
15 employer contributions totaled over \$10.5 million and the plan had 905 active participants.
16 [A true and correct copy of the Annual Report Form 5500 and attached financial statement
17 for the plan year ending June 30, 2002 is attached hereto as Exh. 34, MZLA 0009289,
18 MZLA 0009290 & MZLA 0009416.]
19

20 38. Since 1993, Mr. Sullivan has transferred large sums out of the Pension
21 Plan's account and into the account of the Convalescent Fund, using the Administration
22 checking account as an intermediary. These transfers of cash from the Pension Plan
23 account, along with accrued interest, are one component of an asset item on the Pension
24 Plan's financial statement, called a "Receivable Due from Administration." The
25 Convalescent Fund's financial statement has a corresponding "Payable to Administration."
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1 39. Neither I nor anyone at EBSA had knowledge of these electronic transfers
2 from the Pension Plan to the Convalescent Fund until after I began my investigation in
3 February 2000.

4 40. Based on a review of actuarial reports and Annual Reports Form 5500s, the
5 Pension Plan's liabilities have exceeded its assets since at least June 30, 1994, and the gap
6 is increasing. The actuaries explained that the Pension Plan's total unfunded liability
7 could be significantly greater than reported since \$38 million (approximately 25% of the
8 Pension Plan's assets) are comprised of the "Receivable Due from Administration." The
9 actuaries further explained that their projections depend on the "Receivable Due from
10 Administration" earning 6.5%; otherwise, the funding status of the Pension Plan could be
11 worse than detailed in the report. [A true and correct copy of the Pension Plan's Actuarial
12 Valuation for the plan year ending June 30, 2002 is attached hereto as Exh. 35, MZLA
13 0017192.]

14 41. Based on the documents I reviewed and the interviews I conducted, the
15 assets transferred from the ERISA Plans, whether transferred to the Convalescent Fund for
16 Konocti or for some other purpose, are not memorialized in loan documents, contracts, or
17 securities. During the course of my investigation, I found no promissory notes, repayment
18 terms, security agreements, security instruments, pledges of collateral, or loan covenants.
19 [A true and correct copy of the Report of Interview of Frank Sullivan taken July 2, 2001,
20 is attached hereto as Exh. 20, ¶¶ 9-10 MZLA 0031068; a true and correct copy of the
21 Report of Interview of Mark Eitelgeorge taken June 12, 2002, is attached hereto as Exh.
22 30, ¶¶ 8-9 MZLA 0031374.]

1 42. Neither I nor anyone at EBSA had knowledge of the facts referenced in
2 Paragraph 41 before I began my investigation in February 2000.

3 43. During the course of my investigation, I found no documents to
4 memorialize the "Receivable Due from Administration" transfers shown on the Pension
5 Plan's financial statements as a loan, investment or equity. I found no documents that
6 would have given the Pension Plan the right to demand payment or enforce its right to
7 repayment of the "Receivable Due from Administration." [A true and correct copy of the
8 Report of Interview of Frank Sullivan taken July 2, 2001, is attached hereto as Exh. 20 ¶¶
9 9-10 MZLA 0031068; a true and correct copy of the Report of Interview of Mark
10 Eitelgeorge taken June 12, 2002, is attached hereto as Exh. 30 ¶¶ 8-9 MZLA 0031374.]
11

12 44. Neither I nor EBSA had any knowledge of these circumstances described
13 in Paragraph 43 before I began investigating the Pension Plan in February 2000.
14

15 45. As I understand it, Mr. Mazzola's position is that the money represented by
16 the "Receivable Due from Administration" is not a loan for which repayment is expected,
17 but an investment in Konocti and that he views Konocti as a de facto asset of the Pension
18 Plan. [A true and correct copy of the excerpt from the Administrative Deposition of Larry
19 Mazzola, Sr. taken September 3, 2003, is attached hereto as Exh. 31, MZLA 0001099.]
20

21 46. The documents I reviewed during my investigation in February 2000
22 confirmed that Konocti is owned by the Convalescent Fund and Lakeside Haven, a
23 subsidiary to the Convalescent Fund, and that the status of Konocti's ownership has not
24 changed since Mazzola I. [A true and correct copy of the CBA is attached hereto as Exh.
25 21 § 48(h), MZLA 0011301, 0011331; a true and correct copy of the Appraisal Of:
26
27
28

1 Konocti Harbor Resort & Spa dated July 2003 by Carneghi-Bautovich & Partners, Inc. is
2 attached hereto as Exh. 10, MZLA 0106491, 0106517.]

3 47. My investigation confirmed that the Pension Plan does not hold title to
4 Konocti.

5 48. My investigation disclosed that, although millions of dollars of Pension
6 Plan money has, according to Mr. Mazzola, been spent on Konocti, the Pension Plan's
7 "Receivable Due from Administration" is not supported by any ownership or security
8 interest in Konocti's land, buildings, or furniture.
9

10 49. During the course of my investigation, I reviewed documents, specifically
11 the Pension Plan's Annual Forms 5500 and annual financial statements. Nowhere in those
12 documents is Konocti listed or mentioned as an asset of the Pension Plan.
13

14 **Other ERISA Plans**

15 50. Pursuant sections 47 & 48 of the CBA, U. A. Local 38 sponsors several
16 other ERISA-covered trust funds, including the Apprenticeship Fund, the Health &
17 Welfare Plan, the Vacation & Holiday Fund, and the Scholarship Fund. [A true and
18 correct copy of the CBA is attached hereto as Exh. 21, MZLA 0011301, MZLA 0011328
19 – MZLA 0011333.] As of June 30, 2004, the Apprenticeship Fund and the Vacation &
20 Holiday Fund showed "Receivables Due from Administration" of over \$4.4 million. [A
21 true and correct copy of the Administration Trust Funds financial statement for the plan
22 year ending June 30, 2004, is attached hereto as Exh. 36, MZLA 00144862, MZLA
23 00144870.]
24

25 **The Convalescent Fund**
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1 51. The Convalescent Fund was established in May 1956 by trustors
2 representing Local 38 and signatory employers and employer associations. The original
3 Convalescent trust agreement was amended several times, most recently on December 9,
4 1985. [True and correct copies of the Convalescent Trust Agreements dated December
5 31, 1974 and November 30, 1978 are attached hereto as Exh. 37, MZLA 0005365 –
6 MZLA 0005411.] The parties to the CBA select the trustee, and under the Convalescent
7 trust agreement they may amend or terminate the trust and remove the trustee for cause.
8 Trust Agreement §§ 4.5 and 4.7.
9

10 52. Mr. Smith was first certified in his appointment as the Independent Trustee
11 in September 1980. [True and correct copies the Agreement to accept appointment and
12 the Certification of Appointment are attached hereto as Exh. 38, MZLA 0004588; MZLA
13 0007105; MZLA 0013232.]
14

15 53. On July 14, 2003, Mr. Sullivan memorialized a conversation between Mr.
16 Mazzola and Scott Strawbridge, Northern California Mechanical Contractors Association,
17 removing William W. Ward as the a Co-Trustee of the Convalescent Fund and appointing
18 Richard L. Milsner. In a letter dated June 7, 2004, Mr. Mazzola purportedly confirmed a
19 second conversation appointing Richard L. Milsner the sole trustee effective June 1, 2004
20 due to the recent death of Mr. Smith. [A true and correct copy of the June 7, 2004 letter
21 from Larry Mazzola, Sr. to Scott Strawbridge is attached hereto as Exh. 39, MZLA
22 0030463.]
23

24 54. In 1990, the Department determined that the Convalescent Fund was not an
25 ERISA-covered "employee benefit plan" because the benefits provided by the trust did not
26 clearly fall within the categories of benefits described in sections 3(1) or 3(2) of ERISA.
27
28

1 55. The Convalescent trust agreement identifies three broad purposes of the
2 trust: to operate and maintain Konocti (then known as Konocti Harbor Inn); to provide
3 housing facilities and other services to meet the physical, social and psychological needs
4 of retired employees; and to operate a summer camp for children of employees. [A true
5 and correct copy of the Convalescent trust agreement is attached hereto as Exh. 37, MZLA
6 0005367.] In operation, permanent housing for retirees is no longer is offered, but the
7 Convalescent Fund still operates Konocti, which gives preference and discounts to
8 employees of participating employers (whether or not they are convalescing). [A true and
9 correct copy of the Report of Interview of Gregory Bennett taken April 23, 2002, is
10 attached hereto as Exh. 40, MZLA 0031326.] The Convalescent Fund also operates Camp
11 Konocti, the Local 38 summer camp, and hosts the Pension Plan's annual "retirees' week,"
12 which makes Konocti available for one week each year to the Plan's retirees.

13 56. As described above, Mr. Sullivan transferred millions of dollars in cash to
14 the Convalescent Fund from the bank accounts of Local 38's ERISA-covered plans which
15 are reflected in the financial statements. As I understand Mr. Mazzola's position, he does
16 not view the Convalescent Fund as having any obligation to repay the Pension Plan or any
17 other Local 38 ERISA Plan. [A true and correct copy of the Report of Interview of
18 Lawrence Mazzola, Sr. taken June 19, 2002, is attached hereto as Exh. 32, MZLA
19 0031382.]

20 57. In any event, the Convalescent Fund has few sources of revenue. My
21 investigation discovered that Konocti, the only significant asset of the Convalescent Fund,
22 is not and has never been profitable. It was not until after I began my February 2000
23 investigation that EBSA learned that the Convalescent Fund has had recurring losses from
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1 operations, negative working capital, and a net capital deficiency for more than ten years.

2 Every financial statement since the plan year ending December 31, 1996 of the

3 Convalescent Fund included the following note by the auditors:

4 The Fund has recurring losses from operations and has negative working capital
5 and a net capital deficiency. The Fund's ability to continue as a going concern is
6 dependent on increased and continued employers' contributions, and improved
7 cash flows from operations. These matters raise substantial doubt about the Fund's
8 ability to continue as a going concern.

9 I and EBSA had no knowledge of the Convalescent Fund's financial condition from the
10 mid-1990s to present until after I began my investigation in 2000.

11 58. Pursuant to section 4.7 of the Convalescent trust agreement, the assets of
12 the Convalescent Fund will revert to the Pension Plan if the Convalescent Fund is
13 terminated by Local 38 and representatives of the employer parties to the collective
14 bargaining agreement, but only after all other debts of the Convalescent Fund have been
15 repaid. [A true and correct copy of the Convalescent trust agreement is attached hereto as
16 Exh. 37, MZLA 0005367, 0005379.]

17 59. As of the plan year ending December 31, 2003, the Convalescent Fund's
18 debts included:

- 19
- 20 a. A promissory note in favor of Local 38, secured by a first deed of trust on
21 Konocti. The note, originally in the amount of \$6 million, had a balance of
22 \$5,854,125.
23 b. A payable to the Health & Welfare Plan of \$4,781,993.
24 c. A payable to Administration of \$51,946,776.
25
26
27
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1 [A true and correct copy of the Convalescent Fund's Annual Report Form 5500
2 and attached financial statements for the plan year ending December 31, 2003 is
3 attached hereto as Exh. 41, MZLA 0008552, MZLA 0008574.]

4
5 60. As stated above, the Convalescent Fund was to be administered by an
6 Independent Trustee. As disclosed by my investigation, the Convalescent Fund appears to
7 have been in fact controlled by Messrs. Mazzola and Sullivan. The following sequence of
8 events illustrates Mr. Mazzola's influence over Mr. Smith, the Independent Trustee at the
9 time. In a letter to the Department of Labor, dated July 8, 2003, Mr. Smith responded to
10 the Department's warning that a sale of Konocti could be interpreted as a fiduciary act
11 with respect to the Pension Plan:
12

13 ON OR ABOUT 1978, MR FRANK SULLIVAN WAS DELEGATED
14 "ADMINISTRATOR OF THE CONVALESCENT TRUST" SUBJECT
15 OF THIS CORRESPONDENCE...

16 HE AND THE ADVISORY MEMBERS FUNCTION IN THE
17 IMPLEMENTATION OF ALL MATTERS CONCERNING THE SAID
18 TRUST. I AM THE COSMETIC TRUSTEE.

19 I AM SEMI RETIRED, HOWEVER I AM USED TO SIGN
20 IMPORTANT PAPERS.

21 CO TRUSTEES ATTEND NEEDS OF THE TRUST.

22 I WAS UNAWARE OF THE PENSION TRANSFERS.

23 [Sic original case, spelling and punctuation]. [A true and correct copy of the letter from
24 M. Maroni Smith to William P. Tedesco dated July 8, 2003 is attached hereto as Exh. 42.]

25 61. Previously, in August 30, 2001, Mr. Smith told me he was "cosmetically" a
26 trustee of the Convalescent Fund. [A true and correct copy of the telephone memorandum
27 of M. Maroni Smith, taken August 30, 2001, is attached hereto as Exh. 43 ¶ 5 MZLA
28 0031199, MZLA 0031200.]

1
2 62. The following letter from Mr. Smith to Mr. Sullivan dated May 14, 1984
3 ("Re: Konocti") is representative of Mr. Smith's ceding of authority to Mr. Sullivan:

4 I am returning some material that has been referred to my office.

5 All administrative items such as repairs, maintenance supplies, etc., are
6 administrative problems and your administrative discretion is needed to
7 pass on these items. If for purposes of comfort you want me to initial them,
8 kindly affix your initials and have me give initials as well.

9 I rely completely on you as administrator as to the administration of
10 Konocti, and it is your discretion that is to be applied to the acceptance or
11 refusal of all contractors and suppliers' applications for business.

12 The only admonition I make is that any of these contracts you accept you
13 do so with the discretion that you have and exercise responsible application
14 and conclusions as to their reasonableness and appropriateness [sic].

15 At the your board meetings you should have a paragraph reciting all acts of
16 all agents in behalf of the trust are endorsed, embraced, ratified and
17 approved both prospectively and retrospectively.

18 [A true and correct copy of the letter from M. Maroni Smith to Frank
19 Sullivan dated May 14, 1984 is attached hereto as Exh. 44, MZLA 0005028.]

20 63. Mr. Smith was compensated \$2500 per month by the Convalescent Fund
21 for what he estimated to be approximately 4 hours per week. He stated in his
22 administrative deposition that he remained trustee of the Fund to pay for his medications.

23 Q: So you plan to stay as the trustee of the convalescent trust until your death?

24 A: So I can pay for my pharmaceuticals.

25 Q: How much are you paid by the convalescent trust?

26 A: \$2500 a month.

27 [A true and correct copy of the excerpts from the Deposition of M. Maroni Smith,
28 taken July 29, 2003, is attached hereto as Exh. 45, MZLA 0001440; 0001514.]

Konocti Operations and Capital Improvements Funded by ERISA Plans

64. The Convalescent Fund's primary asset is Konocti, a 255-room resort hotel located on Clear Lake in California. [A true and correct copy of the Appraisal Of: Konocti Harbor Resort & Spa dated July 2003 by Carneghi-Bautovich & Partners, Inc. is attached hereto as Exh. 10, MZLA 0106491, 0106497.] The hotel has no corporate status and does not file a tax return in its own name, although its losses are reflected in the tax returns and financial statements of the Convalescent Fund. [A true and correct copy of the Report of Interview of Mark Eitelgeorge taken October 17, 2001 is attached hereto as Exh. 46 ¶¶ 1 – 6 MZLA 0031290, MZLA 0031291.]

65. During the course of my investigation I learned that, since at least 1993, Konocti has never been profitable and maintains an occupancy rate of around 45 percent. [A true and correct copy of the Appraisal Of: Konocti Harbor Resort & Spa dated July 2003 by Carneghi-Bautovich & Partners, Inc. is attached hereto as Exh. 10, MZLA 0106491, 0106544.] Without the cash infusions from the ERISA plans continued operation of the resort would not be possible.

66. When I began my investigation, I researched Konocti's financial condition at the time of the investigation and worked backward in time to the earlier investigations and Mazzola I. By the time the Secretary filed the current lawsuit, my investigation had established Konocti's dire financial condition; however, before my investigation, neither I nor EBSA had any knowledge of Konocti's lack of profitability during the years at issue in this lawsuit.

67. Mr. Mazzola hired Gregory Bennett ("Mr. Bennett") to be Konocti's general manager in 1990. [A true and correct copy of the excerpt of the Deposition of

1 Gregory Bennett taken October 28, 2003 is attached hereto as Exh. 47, MZLA 000398.]
 2 Between 1996 and 2002, Mr. Bennett made extensive improvements and renovations to
 3 the Konocti complex using the cash infusions from the Local 38 Funds. Mr. Bennett
 4 completely remodeled all guest rooms, managers' apartments, common areas, and
 5 grounds, installed a new sewage treatment plant and water purification facility, and
 6 replaced all roofs. Other capital improvements included: a concert hall, amphitheater,
 7 meeting center, swimming pools, decorative fountains, stone work, landscaping (including
 8 palm trees), irrigation systems, rebuilt docks, and boats.² [True and correct copies of
 9 schedules of fixed asset additions prepared at Frank Sullivan's direction dated June 11th
 10 and July 30th 2003 are attached hereto as Exh. 48, MZLA 0028446 and 0028374.]

13 68. According to Mr. Sullivan, the costs of the "fixed asset additions" between
 14 1996 and 2002 totaled approximately \$39.5 million. [True and correct copies of schedules
 15 of fixed asset additions prepared at Frank Sullivan's direction dated June 11th and July 30th
 16 2003 are attached hereto as Exh. 48, MZLA 0028446 and 0028374.]

18 69. Messrs. Sullivan and Mazzola have made all the decisions regarding
 19 improvements at Konocti. [A true and correct copy of the excerpt of the Administrative
 20 Deposition of Larry Mazzola, Sr. taken September 3, 2003 is attached hereto as Exh. 31,
 21 MZLA 0001083 and MZLA 0001094; a true and correct copy of the excerpt of the
 22 Administrative Deposition of M. Maroni Smith taken July 29, 2003, is attached hereto as
 23 Exh. 45, MZLA 1501 – MZLA 0001503; a true and correct copy of the excerpt of the
 24 Administrative Deposition of Gregory Bennett taken October 28, 2003 is attached hereto
 25

28 ² Konocti has nearly 100 boat slips and a fleet of over 40 vessels, including Waverunners, ski boats, fishing boats, kayaks, paddleboats, and the Konocti Princess, an 80-passenger, Mississippi-style paddle wheeler.

1 as Exh. 47, MZLA 0000541 – MZLA 0000542.] Mr. Bennett took no direction from, and
2 did not report to Mr. Smith or the Joint Board. [A true and correct copy of the excerpt of
3 the Administrative Deposition of Gregory Bennett taken October 28, 2003, is attached
4 hereto as Exh. 47, 0000490 – MZLA 0000491.] While Mr. Smith approved of or
5 acquiesced in every capital expense and improvement for Konocti, these expenses were
6 authorized by Messrs. Sullivan and/or Mazzola.
7

8 **Joint Board of Trustees**

9 70. The Administrative Trust Agreement imposes on all trustees the basic
10 fiduciary duties mandated by ERISA, including acting for the exclusive purpose of
11 providing benefits to plan participants; prudent administration; and diversification of trust
12 assets. The agreement also restricts fiduciaries from self-dealing and prohibited
13 transactions and imposes liability for fiduciary breaches and co-fiduciary liability. Trust
14 agreement §§ 4.3 and 4.4. [A true and correct copy of the Trust Agreement is attached
15 hereto as Exh. 26, MZLA 0011356.]
16
17

18 71. Based on my review of plan documents and administrative depositions, the
19 trustees were uninformed of many of the financial aspects of the ERISA Plans under their
20 supervision. For example, the trustees, with the exception of Mr. Mazzola,³ claim to know
21 nothing about the transfer of assets from the Pension Plan to the Convalescent Fund,
22 despite the fact that the growing "Receivable Due from Administration" was reported
23 annually on the Pension Plan's financial statements and independent auditor's reports.
24
25
26

27 ³ When discussing the lack of involvement of the Trustees, I am referring to all Trustees
28 on the Joint Board, except Co-Chairman Larry Mazzola, Sr., who generally knew and/or
approved of the fiduciary breaches described in this declaration.

1 72. No trustee could admit to having seen a financial statement for any of the
2 Funds under their supervision.

3 73. Most of the trustees had no knowledge of Mr. Sullivan's electronic transfers
4 of cash from the ERISA Plan accounts to the Administration checking account and
5 ultimately to the Convalescent Fund.
6

7 74. Although the Joint Board holds meetings on a quarterly basis, Messrs.
8 Mazzola and Sullivan controlled the agendas for the meetings and determined what
9 documents to provide to the Trustees. [A true and correct copy of the excerpt from the
10 Administrative Deposition of Robert Buckley, Sr. taken September 4, 2003, is attached
11 hereto as Exh. 17, MZLA 0000697 – MZLA 0000698; and, a true and correct copy from
12 the excerpt from the Administrative Deposition of Larry Mazzola, Sr. taken September 3,
13 2003, is attached hereto as Exh. 31, MZLA 0001057 – MZLA 0001058.] None of the
14 trustee meeting minutes that I reviewed during the course of my investigation contained
15 any reference to Pension Plan's "Receivable Due from Administration," or the electronic
16 transfer of ERISA plan funds to Konocti. [A true and correct copy of a summary of the
17 Pension Plan's Joint Board Minutes is attached hereto as Exh. 49.]
18
19

20 75. While the Pension Plan's other real estate investments and all other assets
21 are under the management of professional investment money managers, its "Receivable
22 Due from Administration" is not.
23

24 76. During my investigation, Mr. Sullivan claimed that the Trustees oversaw
25 his work. [A true and correct copy of the Report of Interview of Frank Sullivan taken July
26 12, 2002 is attached hereto Exh. 27, ¶ 5 MZLA 0031397.] However, all evidence
27 compiled during the investigation indicated that, in reality, the trustees, other than Mr.
28

1 Mazzola, did not oversee his work and, for the most part, were not aware of his work,
2 particularly with respect to the electronic transfers. Mr. Sullivan took little direction from
3 the Joint Board, other than Mr. Mazzola. In fact, the Trustees had only a vague
4 comprehension of Mr. Sullivan's duties and who was responsible for supervising him. [A
5 true and correct copy of the excerpt of the Administrative Deposition of Frank Sullivan
6 taken September 2, 2003 is attached hereto as Exh. 28, MZLA 0001578.]

8 77. My review of the Joint Board meeting minutes for the Pension Plan
9 disclosed no reports from consultants, advisers, or investment managers ever reported to
10 the Joint Board regarding these expenditures in connection with Konocti or transfers to the
11 Convalescent Trust. [A true and correct copy of the excerpt of the Administrative
12 Deposition of Frank Sullivan taken September 2, 2003 is attached hereto as Exh. 28,
13 MZLA 0001578.]

15 78. Mr. Mazzola, who was aware of Mr. Sullivan's electronic transfers, did
16 nothing to evaluate the soundness of the decision to continue to spend millions of dollars
17 of ERISA plan money on Konocti. [A true and correct copy of the excerpt of the
18 Administrative Deposition of Frank Sullivan taken September 2, 2003 is attached hereto
19 as Exh. 28, MZLA 0001578.] To the extent the money was used to improve Konocti,
20 during my investigation, I saw no documents indicating the Messrs. Mazzola or Sullivan,
21 or any of the trustees, requested current appraisals, feasibility studies, demographic
22 reports, valuations, cost-benefit analyses, risk/return analyses or the advice of any
23 professional investment advisor or manager before ERISA monies were spent.

26 79. To the extent the ERISA funds were spent on items other than Konocti, I
27 saw no documents during my investigation indicating that the trustees made any effort to
28

1 identify where the money went and whether it was being spent in such a way that the
2 ERISA Plans would receive a reasonable rate of return. I saw no timely appraisals or
3 appraisals that supported the amounts of the electronic transfers, feasibility studies,
4 demographic reports, valuations, cost-benefit analyses, risk/return analyses or a request for
5 advice from any professional investment advisor or manager before ERISA monies were
6 spent.
7

8 80. As of August 10, 2001, I had spent only about 12 days investigating this
9 case, in part because Mr. Sullivan had been slow in providing documents. [A true and
10 correct copy of my August 10, 2001 Case Review is attached hereto as Exh. 50, MAZ
11 003421-3422. By December 6, 2001, I had spent about 34 days in total on the case and
12 was still in the midst of conducting interviews and obtaining documents. [A true and
13 correct copy of my December 12, 2001 Case Review is attached hereto as Exh. 51, MAZ
14 003428-3430.]
15

16 IV. CONCLUSION

17
18 81. Based on the documents reviewed and the results of my investigation, it
19 does not appear that the Joint Board, with the exception of Mr. Mazzola, informed
20 themselves of Mr. Sullivan's electronic withdrawals of ERISA plan funds, or that he
21 sought approval from the Joint Board before making the cash transfers. The electronic
22 expenditures are represented as an item "ERISA Plans' Receivable." Neither the transfers
23 nor the Receivables are supported by promissory notes, loans agreements, agreements to
24 repay, contracts, security agreements, guarantees or deeds of trust. Mr. Mazzola never
25 informed the other members of the Joint Board of Mr. Sullivan's electronic withdrawals.
26 Had the other members of the Joint Board at a minimum reviewed the financial
27
28

1 statements, it would have been alerted to the ever-increasing receivable and prompted to
2 conduct additional inquiry. [A true and correct copy of the excerpt from the
3 Administrative Deposition of Arthur Rud, taken September 4, 2003, is attached hereto as
4 Exh. 11, MZLA 0001316; a true and correct copy of the excerpt from the Administrative
5 Deposition of Ron Fahy, Jr., taken September 4, 2003, is attached hereto as Exh. 13,
6 MZLA 0000832; a true and correct copy of the excerpt from the Administrative
7 Deposition of Vohon Kazarian taken September 5, 2003, is attached hereto as Exh. 15,
8 MZLA 0000975 – MZLA 0000976; a true and correct copy of the excerpt from the
9 Administrative Deposition of Robert Buckley, Sr., taken September 5, 2003, is attached
10 hereto as Exh. 17, MZLA 0000747.]
11
12

13 I declare under penalty of perjury of the laws of the United States that the
14 foregoing is true and correct, and that this declaration was executed on January 30, 2007
15 in San Francisco, California.
16

17 
18

KARL SPARGUR